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No. 96-188

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Pursuant to Rule 15.8 of the Rules of this Court, petitioners respectfully draw to this Court's attention the decision of the United States Court of Appeals for the Tenth Circuit in *Duffee v. Murray Ohio Mfg. Co.*, Nos. 95-3055 and 95-3241, issued August 5, 1996. The Tenth Circuit decided *Duffee* the same day that the petition for certiorari in this case was filed.

In this new decision, the Tenth Circuit confirms the split in the Circuits and specifically rejects the holding of the Eleventh Circuit in the present case. The Tenth Circuit explains:

"The only issue that this court must reach is the question of what standard should be used to review decisions to exclude expert testimony under *Daubert* that result in summary judgment. . . . The Third and Eleventh Circuits, while acknowledging that evidentiary rulings usually receive greater deference, have nonetheless held that 'when the district court's exclusionary evidentiary rulings with respect to scientific expert testimony will result in a summary or directed judgment, we will give them a "hard look" (more stringent review) to determine if a district court has abused its discretion in excluding evidence as unreliable.' *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-750 (3d Cir. 1994) (citation omitted); see *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir. 1996) (applying 'a particularly stringent standard of review to the trial judge's exclusion of expert testimony.') The Seventh Circuit, on the other hand, has held that the trial judge's decision to exclude evidence under *Daubert* should be reviewed for abuse of discretion, even when that decision results in summary judgment. *Buckner v. Sam's Club, Inc.*, 75 F.3d 316, 318 (7th Cir. 1996); see *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)."

Pp. 2a-3a, *infra*. The Tenth Circuit then explicitly rejects the standard of the Eleventh and Third Circuits, and follows that of the Seventh Circuit: it concludes that rulings excluding expert testimony under *Daubert* "are properly reviewed under the traditional abuse of discretion standard." P. 3a, *infra*.

The full text of the Tenth Circuit's decision, rejecting that of the Eleventh Circuit here, is reprinted in the addendum hereto.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Nos. 95-3055 and 95-3241

**SHANE DUFFEE, Minor, by and
Through Guardian and Next Friend,
ROSE THORNTON,
Plaintiff-Appellant,**

v.

**MURRAY OHIO MANUFACTURING CO.,
WAL-MART STORES, INC., and
SHIMANO AMERICAN, INC.,
Defendants-Appellees.**

**Appeal from the United States District Court
for the District of Kansas
(D. Ct. No. 94-CV-4022)
Judge Sam A. Crow**

August 5, 1996, Filed

**Before TACHA, McWILLIAMS, and BALDOCK, Cir-
cuit Judges.**

TACHA, Circuit Judge.

On February 21, 1992, Shane Duffee was struck by a car while riding his bicycle. By and through his guardian and next friend Rose Thornton, Duffee sued Wal-Mart, Murray Ohio Manufacturing Company, and Shimano American, Inc., alleging warning, design, and manufacturing defects under negligence, strict liability, and warranty theories. The district court granted summary judgment in favor of Wal-Mart and Murray on all claims on February 8, 1995. The court granted summary judgment in favor of Shimano on all claims on July 24, 1995. After careful review of the record, we adopt the analysis of the district court's February 8, 1995, and July 24, 1995, orders.

In the February 8 order, the district court determined that testimony from Duffee's expert regarding the safety of the brakes on Duffee's bike was inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The only issue that this court must reach is the question of which standard should be used to review decisions to exclude expert testimony under *Daubert* that result in summary judgment. Ordinarily we review the grant or denial of summary judgment de novo. *Wolf v. Prudential Ins. Co. of Am.*, 50 F.3d 793, 796 (10th Cir. 1995). Evidentiary rulings, however, are generally reviewed for abuse of discretion. *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1047 (10th Cir. 1993). The Third and Eleventh Circuits, while acknowledging that evidentiary rulings usually receive greater deference, have nonetheless held that "when the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a 'hard look' (more stringent review) to determine if a district court has abused its discretion in excluding evidence as unreliable." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3d Cir. 1994) (citation omitted); see *Joiner v. General Elec. Co.*, 78 F.3d 524,

529 (11th Cir. 1996) (applying "a particular stringent standard of review to the trial judge's exclusion of expert testimony.") The Seventh Circuit, on the other hand, has held that the trial judge's decision to exclude evidence under *Daubert* should be reviewed for abuse of discretion, even when that decision results in summary judgment. *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292-93 (7th Cir. 1996); see *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). *Daubert* requires district judges to act as gatekeepers to ensure that scientific evidence is both relevant and reliable. *Daubert*, 113 S. Ct. at 2796-97. This entails two inquiries: whether the reasoning and methodology underlying the testimony is scientifically valid, and whether the reasoning and methodology can properly be applied to the facts. *Id.* at 2796. Like the Supreme Court, we "are confident that federal judges possess the capacity to undertake this review." *Id.* Their decisions, therefore, are properly reviewed under the traditional abuse of discretion standard. In this case, the district judge found that the testimony of the plaintiff's expert was not supported by appropriate validation, and therefore was inadmissible under *Daubert*. After reviewing the record, we conclude that the district judge did not abuse his discretion by excluding this testimony.

We AFFIRM for substantially the reasons given by the district court and ORDER both of the district court's orders in this case to be published.